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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-312

DAVID B. SWOAP, as Director etc., et al.,
Petitioners,

vs.

WILLIAM WAITS, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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Comes now petitioner State of California, Department of Benefit Payments, and respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered July 2, 1974.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of California appears as Appendix A hereto and is reported at 11 Cal. 3d 887, 524 P.2d 117 (1974).

JURISDICTION

The judgment and opinion of the Supreme Court of the State of California was entered on July 2, 1974. Rehearing

was denied August 7, 1974. This petition was filed within ninety days of July 2, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). Review is sought of a state court decision which invalidated a state departmental administrative regulation which applied to all AFDC recipient children. As an exercise of the state's law-making power, the regulation in question comes within the meaning of "state statute" as used by Congress in 28 U.S.C. 1257(3) See *Hamilton v. Regents,* 293 U.S. 245, 258 (1934); *Northern Pacific v. Dept. of Public Works,* 268 U.S. 39, 42 (1924).

QUESTION PRESENTED

Congress in enacting the AFDC provisions of the Social Security Act of 1935, as amended, requires that the amount of assistance paid by a state be based on the amount needed in the individual case after other income and resources are considered. 42 U.S.C. 602(a)(7). California promulgated a welfare regulation which counted against the AFDC maximum aid payment the value of housing and utilities received by an AFDC recipient child from a "non-needy" relative with whom the child is living. The question presented is whether the decision of the Supreme Court of the State of California invalidating this regulation brings state law into conflict with federal law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> "Section 602(a) A state plan for aid and services to needy families with children must . . . (7) . . . provide that the state agency shall, in determining need, take into consideration any other income and *resources* of any child or relative claiming aid to families with dependent children, ..." (Emphasis added.)

STATEMENT OF THE CASE

Respondent William Waits does not receive welfare aid but receives AFDC assistance on behalf of three AFDC eligible grandchildren and three AFDC eligible great grandchildren. CT 2, 95. Respondent Ida Mae Brown does not receive welfare aid but receives AFDC assistance on behalf of two nieces and one nephew. CT 2, 95. Respondent Ruby Lucey does not receive welfare aid but receives AFDC assistance for her AFDC eligible grandchild. CT 2, 95. Respondent Catherine Jermany is President of the California Welfare Rights Organization, an association composed of AFDC welfare recipients. CT 3, 95. Petitioners are David B. Swoap, Director of Benefit Payments, State of California, and the State of California, Department of Benefit Payments. Respondents filed their class action in the state trial court to have certain AFDC regulations declared invalid. CT 1. The trial court found the regulation invalid and enjoined its enforcement. CT 179. The Supreme Court of the State of California affirmed the trial court's judgment. Appendix A. hereto.

Petitioners in their petition for rehearing to the Supreme Court of the State of California contended that the decision of the Court erroneously brought the state's welfare laws into conflict with federal law. It was argued that 42 U.S.C. 602(a)(7) and 45 C.F.R. 233.20(a)(ii)(a) required them to consider the value of the housing and utilities which are provided by a non-needy relative to AFDC-recipient children in determining the amount of AFDC assistance to be paid. Excerpts from petitioner's brief for rehearing in the state Supreme Court are set forth in Appendix B hereto. Petitioners' petition for rehearing was denied by the Supreme Court of the State of California on August 7, 1974.

In 1971 the California Legislature modified its AFDC program to establish a flat grant system in which the need and grant levels were determined with reference to family size. § 11450; Calif. Stats. 1971, ch. 578; repealed and added by Stats. 1972, ch. 1406; amended by Stats. 1973, ch. 75.[1] The amount of assistance payable was calculated as follows: Maximum aid less nonexempt income equals cash grant. In order to meet the requirements of federal law, California adopted administrative regulations which placed a value upon the housing and utility needs of different sized AFDC families. Regulation PSS 44-115.9; CT 90; Appendix C. The regulation here in question, PSS 44-115.611, provided for a reduction of the AFDC grant paid on behalf of recipient children where the housing and utility needs of the children were met in whole or in part by a "non-needy" relative[2] with whom they were living. The

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1. Unless otherwise indicated, all section references are to the California Welfare and Institutions Code.

The current section 11450 schedule of benefits, adjusted for cost of living are:

Size of FBU	Maximum Aid
1	$129
2	212
3	262
4	311
5	355
6	400
7	438
8	477
9	516
10 or more	554

Regulation 44-315.41, Appendix D hereto

2. Natural parents, adoptive parents and stepfathers were excluded from the definition of "relative" by regulation PSS 44-115.6. "Non-needy" means not receiving welfare aid. PSS 44-115.6, Appendix C hereto.

amount of this reduction was determined by subtracting any increased housing and utility costs of the non-needy relative from the value of the children's housing and utility needs. § 11450; Regulation PSS 44-115.611. For example the respondent Waits at the time of the litigation below was entitled to receive a maximum aid payment of $360.00 per month less nonexempt income on behalf of the six children. CT 15. From the $360.00 there was subtracted "in-kind income" of $86.00 per month for housing and $15.00 for utilities which were furnished without additional cost to the six AFDC-recipient children in respondent's care. Appendix A, p. 3; CT 90.[3] Regulation PSS 44-115.611; CT 89; Appendix C hereto. The assistance paid for support of the children was therefore reduced to $259.00, Appendix A, p. 3.

The Supreme Court of the State of California found the regulation to be inconsistent with the "flat grant" system since the reduced needs of housing and utilities were already taken into account by the California Legislature in computing the need levels fixed in section 11450 (Appendix E). Appendix A, p. 7. The State Supreme Court held, as an additional ground of decision, that the regulation was invalid as conclusively presuming that non-needy relatives intend to make a gift of the value of the housing and utilities to the AFDC children when the children are taken into the relative's home. Appendix A, pp. 10-11. The state court also found the regulation invalid as assigning a fictional value to the housing and utilities so furnished, if it is assumed that such action produced cognizable income. Appendix A, pp. 11-13. Lastly, the regulation was struck down as

3. Waits would be entitled to a credit for any additional expenses caused by addition of the six children to his household. Appendix A, p. 3, fn. 1; Regulation PSS 44-115.611, Appendix C hereto.

being inconsistent with the congressional objectives of encouraging the care of dependent children in the homes of relatives under 42 U.S.C. 601. Appendix A, p. 3.

REASONS FOR GRANTING THE WRIT

The Decision Below Erroneously Brings California Welfare Law Into Conflict With the Objectives of Congress

The AFDC program is based on a scheme of cooperative federalism. *King v. Smith,* 392 U.S. 309, 316 (1968). State participation in the program is not required at the cost of losing federal funds. As long as a state is receiving federal funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds. *Rosado v. Wyman,* 397 U.S. 397, 408 (1970); *Townsend v. Swank,* 404 U.S. 282, 286 (1971).

In administering AFDC programs, state agencies are required, in determining need, to ". . . take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7).[4] Under HEW regulations, all AFDC plans must specify a statewide standard of need. Both eligibility for AFDC, and the amount of the grant to be paid, are based on a comparison of the "standard of need" with the income and resources available to the applicant or recipient. 45 C.F.R. 233.20(a)(3)(ii)(a).[5] This Court, after

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4. A state AFDC plan must "provide that the state agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7). (Emphasis added.)

5. "A state plan for . . . AFDC . . . must . . . [p]rovide that, in establishing financial eligibility and the amount of assistance payment . . . [a]ll income and *resources* . . . will be considered in relation to the state's standard of assistance. . . ." 45 C.F.R. 233.20(a)(3)(ii)(a). (Emphasis added.) Appendix F hereto.

noting the language of 42 U.S.C. 602(a)(7) and of the applicable federal regulation, stated:

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered. (Emphasis in original text; footnote omitted.) Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations." *Shea v. Vialpando,* ..... U.S. ....., ... (1974).

Neither the federal statute nor regulations define "resources" as used in 42 U.S.C. 602(a)(7). Yet in the related Supplemental Security Income (SSI) program, Congress recognized that the provision of housing, support, and maintenance by a non-aid recipient to an SSI recipient constitutes a resource having value which acts to reduce the SSI aid otherwise payable. Thus 42 U.S.C. 1382(a)(2)(A) provides:

> ". . . that in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in-kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) . . . shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph; . . . ."

It is petitioners' position that the value of "support and maintenance" recognized as unearned income by Congress in 42 U.S.C. 1382 (a)(2)(A) is the same as the value of "housing and utilities" which the state regulation sought

to recognize. If this analogy is proper, then the state is required by 42 U.S.C. 602(a)(7) to recognize as non-exempt income the value of the "housing and utilities" provided by a non-needy relative to the AFDC recipient child.

The objectives of the regulation were twofold. First, the regulation sought to equalize welfare benefits between AFDC recipient children. Using the six children in the care of respondent Waits as an example, it is obvious that these children receive an extra cash benefit each month because their housing and utilities are provided free to them, as compared to an identical six children AFDC budget unit who have to pay out utilities and housing out of their AFDC grant. This invidious discrimination would be measured by the difference between the zero cost for utilities and housing to the Waits AFDC budget unit, and the cost of utilities and housing actually paid out of the grant of the second budget unit. Secondly, the regulation protects the public purse. In the Courts below, the evidence showed that the invalidation of the regulation in question would cause the government to incur the following program costs for the 1972-73 fiscal year:

United States:	$2,283,700.00
State of California:	$1,579,400.00
California Counties:	$ 760,500.00
Total	$4,623,600.00

CT 168-169; Appendix G hereto.

It follows that the decision below erroneously construed state welfare law so as to cause it to come into conflict with the paramount federal requirements that, in determining the needs of an AFDC child, a state shall take into consideration the child's income and resources.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California in this cause.

Respectfully submitted,

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Appendix A

In the Supreme Court of the State of California

In Bank

S.F. 23012 S.F. 23013
Super. Ct. No. 418746

Supreme Court Filed Jul 2 - 1974 G. E. Bishel, Clerk

William Waits et al.,
Plaintiffs and Respondents,

vs.

David B. Swoap, as Director, etc., et al.,
Defendants and Appellants.

This is a companion case to *Cooper v. Swoap,* decided this day, *ante,* p. ■, and presents analogous questions as to the validity of an administrative welfare regulation promulgated subsequent to the Welfare Reform Act of 1971. In *Cooper* we have held that Regulation 44-115.8, authorizing designated deductions from grants of recipients of aid to families with dependent children (AFDC) who share housing with recipients of "adult aid" benefits, is incompatible with the governing legislative provisions and therefore invalid. In this case we address a comparable regulation, Regulation 44-115.611, which authorizes similar deductions from welfare grants of AFDC recipients who share housing with "nonneedy" relatives.

As discussed below, we have concluded that, as in *Cooper,* the instant regulation conflicts with the controlling statutes and cannot stand. Initially, we point out that just as in *Cooper* the regulation at issue emanates from an adminis-

SEE DISSENTING OPINIONS

trative conception of "noncash economic benefits" which is incompatible with the "flat grant" system of welfare pay-

ments established by the 1971 welfare reform legislation. Second, we explain that the benefits at issue cannot properly be characterized as "income" which may be deducted from a recipient's grant. Finally, we demonstrate that even if such benefits could properly be considered "income," the present regulation would still be invalid since it does not measure the actual value of the benefits received by a recipient but instead assigns a fictional value to such benefits. Accordingly, we affirm the trial court's decision invalidating the regulation at issue.

1. *The facts of the instant case.*

Plaintiffs Mr. and Mrs. Waits receive AFDC benefits on behalf of the six needy children (three grandchildren and three great-grandchildren) whom they have voluntarily taken into their home. Under Welfare and Institutions Code section 11450 the six children were entitled at the time this action was commenced to a basic grant of $360 per month; as a result of the promulgation of Regulation 44-115.611, however, the grant was reduced to $259 per month (a $101 deduction). Regulation 44-115.611 had an equally significant effect on the grants received by the families of the two other individual plaintiffs in this case. The grant to the three needy children (two nieces and one nephew) in the care of the Browns was reduced from $235 per month to $140 per month (a $95 deduction); the grant to the needy grandchild in the care of the Luceys was reduced from $115 per month to $48 per month (a $67 deduction).[1]

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1. As in *Cooper*, all the figures utilized in this opinion refer to the figures in force at the time this action was initiated. Although the amounts have been subsequently altered in minor respects in response to changes in the cost of living, such changes have no bearing on the validity of the regulation in question.

The reductions cited in the text reflect the fact that at the time this suit was commenced the Alameda County Welfare Department had interpreted the challenged regulation as requiring that grants to children living with nonneedy relatives be reduced by the *full* amount of the state's housing and utility "allowance"; the county

Seeking to avoid the harsh effects of these reductions, the three families instituted the instant class action, attacking Regulation 44-115.611 as incompatible with the controlling state and federal statutes, and seeking injunctive and declaratory relief. The trial court granted plaintiffs' request for a preliminary injunction and subsequently entered an order declaring the contested regulation invalid and prohibiting its future enforcement. Defendant state and county welfare authorities appeal from the judgment.

In *Cooper v. Swoap, ante,* pp. .....,* we have reviewed at some length the historical background of the Welfare Reform Act of 1971, and the principal innovations introduced by that legislation. Regulation 44-115.611, the regulation at issue here, was one of a series of regulations which the State Department of Social Welfare (department) promulgated as an ostensible implementation of the 1971 act. In substance, the challenged regulation provides that whenever an AFDC recipient has voluntarily been given a home by a "nonneedy" relative,[2] the department

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gave no credit for additional out-of-pocket expenses incurred by the nonneedy relative. Although the state director has since ordered the county to afford such a credit, as we explain *infra,* this credit in no way cures the significant defects of the challenged regulation.

*Multilith opinion, pp. 6-11.

2. Under the department's regulation, a relative is considered "nonneedy" so long as he is not personally receiving benefits from any categorical aid program; the regulation also excludes natural or adoptive parents and stepfathers from the "nonneedy relative" classification. (Reg. 44-115.6.) As the financial circumstances of the present "nonneedy" plaintiffs demonstrate, however, the regulation applies to many who are certainly poor by any standard other than welfare eligibility. For example, Mr. and Mrs. Waits possess as their sole source of income social security payments and a pension to Mr. Waits, the combined total of which amounts to less than $5,000 annually; Mr. Lucey is presently receiving unemployment benefits. All the families have stated by affidavit that under the grant reduction, neither the couples themselves nor the children in their care were getting enough to eat and that the families could no longer afford to clothe the children properly.

will hold that such child has received a designated "income" in the form of housing and utility benefits, which "income" is to be deducted from the child's welfare grant.[3] Although the rationale of the regulation is not explicitly articulated, the regulation appears to rest upon the assumption that a nonneedy relative who agrees to take an AFDC child into his home is necessarily both willing and able to make a gift of housing and utilities to that child; moreover, the regulation further asserts that such housing and utility benefits are "income" to the AFDC recipient which may be deducted from his basic flat grant.

The question presented is whether this regulation is consistent with the prevailing legislative scheme. For the reasons reviewed below, we conclude that the regulation is incompatible with the governing statutes and is therefore invalid.

2. *Regulation 44-115.611, resting as it does on the department's "noncash economic benefit" concept, is completely at odds with the flat grant system of AFDC benefits established by the 1971 legislation.*

Although, unlike the regulation at issue in *Cooper*, the instant regulation was not specifically rejected by the Legislature,[4] Regulation 44-115.611 shares all of the other fatal defects exhibited by the regulation invalidated in *Cooper*. The similarities between the two regulations stem from the

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3. Regulation 44-115.611 provides: "The excess of the in-kind income value [i.e., allowance] for housing and utilities [set forth in Regulation 44-115.9] . . . for the appropriate size Family Budget Unit over the increased cost of living and utilities to the nonneedy relative caused by the presence of the AFDC child(ren) in his household shall be considered a contribution in kind to the Family Budget Unit."

4. To our knowledge, neither the Burgener Bill (Sen. Bill No. 545 (1971 Reg. Sess.)), nor any other welfare reform proposal considered in 1971, contained a provision analogous to the instant regulation; the Legislature's "non-rejection" of the matter thus simply reflects the fact that the issue was never presented to it.

fact that the instant regulation is simply another variation on the department's "noncash economic benefit" theme, a theme which, as explained in *Cooper,* is fundamentally incompatible with the "flat grant" system of welfare benefits adopted by the Legislature in 1971. Thus, although the instant regulation seeks to reduce welfare payments on the basis of reduced housing and utility needs of recipients living with nonneedy relatives, such reduced needs, if they in fact exist, have already been taken into account by the Legislature in computing the flat grant figures of section 11450.[5] Consequently, if approved, the challenged regulation would in reality effect an improper "double deduction" of welfare benefits for those recipients who happen to live with nonneedy relatives.

In singling out children living with nonneedy relatives for disparate treatment, the instant regulation directly conflicts with the legislative mandate that a recipient's reduced need does not provide a basis for reducing the basic amount of the legislatively determined flat grant. As with the regulation at issue in *Cooper,* the legislative subcommittee reviewing the implementation of the 1971 welfare legislation has condemned the present regulation as contrary to the statutory scheme. (Senate-Assembly Subcommittee on Implementation of Welfare Reform, Report to the Legislature (March 17, 1972) p. 21.) We agree with the subcommittee's conclusion that "[t]here is no legal basis in the Welfare Reform Act for [the regulation's] reduction." (*Id.*)

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5. Prior to 1971, AFDC recipients living with "nonneedy" relatives received the same treatment as all other recipients. Their housing costs were paid in the amount of their pro rata share of their living arrangement without regard to the persons with whom they lived; there was no assumption that they received free housing and utilities simply because their relatives had agreed to take them into their homes. As we explained in *Cooper,* in setting the flat grant figure of section 11450 the Legislature averaged the needs of all recipients under the past practice, and consequently such figures took account of any savings enjoyed by recipients living with nonneedy relatives.

3. *The housing and utility benefits at issue do not constitute "income" within the meaning of Welfare and Institutions Code section 11450.*

The department again contends, of course, that the regulation is not contrary to the legislative scheme because it represents a reasonable measure of a recipient's "in-kind" income, which under section 11450, must be deducted from the fixed grant figure. The department's characterization of such benefits as "income," however, is no more persuasive in this context than in *Cooper.*

As we explained in *Cooper,* "noncash economic benefits" in general, and "shared housing" in particular, have never been considered deductible "income" throughout the entire history of California welfare programs, and nothing in the 1971 welfare legislation indicates that the Legislature intended to change that approach. Further, the report of the Legislative Analyst, predicting that the 1971 act would effect no saving in substantive grant payments, confirms the conclusion that the Legislature did not intend to transform these benefits into deductible income. (See *Cooper v. Swoap, ante,* p. ....., fn. 5.)*

Moreover, insofar as the department's characterization of such benefits as "income" rests upon an assumption that nonneedy relatives have made a "gift" of housing and utility resources, the department's position suffers from an even more fundamental defect. The "nonneedy" relatives covered by the present regulation are under no legal duty to support the children whom they have voluntarily taken into their homes. The regulation at issue, however, totally ignores this important fact, and *conclusively presumes* that such relatives, by agreeing to take such children into their homes, are both willing and able to provide the children with free housing and utilities; thus, even if a relative disclaims any

*Multilith opinion, p. 8, fn. 5.

donative intent, the regulation treats the housing and utilities as having been given, free of charge, to the AFDC recipients.[6]

In assigning "income" to an AFDC recipient even though the nonneedy relative with whom he lives may be neither able nor willing to donate such "income," the present regulation conflicts directly with the teaching of the recent United States Supreme Court decisions of King v. Smith (1968) 392 U.S. 309 and Lewis v. Martin (1970) 397 U.S. 552. In both *King* and *Lewis* the court struck down provisions which, like the instant regulation, *assumed* that income or resources of an individual not legally obligated to support the AFDC recipient were available for the recipient's support. Indeed, more recently, several federal district courts have applied *King* and *Lewis* to invalidate administrative practices quite similar to the regulation at issue here. (Jenkins v. George (W.D.Pa. 1969) 312 F.Supp. 289; Marotti v. White (D.Conn. 1972) 342 F.Supp. 823; Boucher v. Minter (D.Mass. 1972) 349 F.Supp. 1240; cf. Hurley v. Van Lare (S.D.N.Y. 1973) 365 F.Supp. 186.) As the three-judge court in *Jenkins* declared: "[W]hether the relationship is one of stepfather, relative or total stranger,

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6. The dissenting opinions share the regulation's defect in this regard, asserting throughout that the challenged regulation only takes into account "free" housing and utilities afforded AFDC recipients by nonneedy relatives. The dissent never comes to grips with the fact that the regulation conclusively presumes such housing and utilities to have been given free of charge, even if the nonneedy relative explicitly disclaims any donative intent or is financially unable to make such a gift.

Of course, if a nonneedy relative does wish to provide a recipient with free housing and utilities, the department can consider such donation as "in kind" income and can deduct an amount, equal to the *actual* value of the housing and utilities provided, from the recipient's welfare grant. (See former Reg. 44-115.62.) Without an explicit indication of donative intent, however, "[t]he [state welfare department] may not assume that a recipient's relatives, not legally liable for his support, will charge less than other persons providing room and board to welfare recipients." (Marotti v. White (D. Conn. 1972) 342 F.Supp. 823, 826.)

the test is simply whether the substitute parent is *required by law* to furnish the support; if he is not, then the state may not, solely by the substitute parent relationship, *assume* a contribution to the child's support by some presumption of availability of income." (Emphasis added.) (312 F.Supp. at p. 292.)

4. *In any event, the regulation is invalid because it does not measure the actual value of the benefits received by a recipient.*

Finally, even if it were permissible to treat the housing and utility resources at issue here as "income" to a recipient, the present regulation would be invalid because it fails to measure the *actual* value of the benefits received by a recipient, but instead assigns a fictional value to such benefits. As in *Cooper,* the instant regulation determines a recipient's income primarily on the basis of the department's own "allowance" figures; under the present regulation "income" is defined as the difference between the appropriate "allowance" figure and the actual additional out-of-pocket expenses incurred by the nonneedy relatives as a result of the child's presence in the home. Thus, if the nonneedy relatives incur no *additional* out-of-pocket expenses, the recipient's income is automatically and conclusively set at the department's allowance figure, *regardless of the actual value of the housing and utility benefits which a recipient in fact receives.*[7]

7. While the "credit" given for actual out-of-pocket expenses would in some cases ameliorate the harshness of the regulation's effect, such credit would in no way cure the regulation's fundamental defects. Under the regulation's terms, the state's housing and utility allowance, rather than the actual value of the benefits received by a recipient, constitutes the basic "income" figure; although the recipient can reduce the size of his purported "income," and the consequent reduction in his grant, if his nonneedy relative incurs additional out-of-pocket expenses, the department never considers the actual value of housing and utility benefits as distinct from out-of-pocket expenses.

As we stated in *Cooper:* "No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient. Only the *actual value* of housing and utilities could possibly constitute income to the recipient, and this the regulation does not measure." (Original emphasis; footnote omitted.) (Cooper v. Swoap, *ante,* at p. .....)*

5. *Conclusion.*

As discussed above, we have concluded that the challenged regulation is incompatible with the provisions of the Welfare Reform Act of 1971 and is consequently invalid. Indeed, the regulation at issue in the instant case is particularly invidious, for it not only contravenes the "flat grant" approach mandated by the 1971 legislation, but, in singling out AFDC children living with "nonneedy relatives" for reduced grants, it undermines one of the central objectives of the entire AFDC program, *"the purpose of encouraging the care of dependent children* in their homes or *in the homes of relatives."* (Emphasis added.) (42 U.S.C. § 601; see Welf. & Inst. Code, § 11205.)

The objective of the challenged regulation is apparently to reduce state expenditures for AFDC children at the expense of relatives who willingly take such children into their homes. In promulgating this unauthorized measure, the department is in reality gambling that close relatives acting as caretakers will feel a moral obligation to keep an AFDC child even though the child can no longer contribute the AFDC grant which the Legislature guaranteed. If the department "wins" its gamble, the state will save money but only at the expense of depriving children of essential need items and subjecting their generous relatives

*Multilith opinion, p. 27.

to unwarranted hardships. If the department loses its gamble, as is all too possible,[8] the children will lose the close family environment sought to be achieved by the act and the state will have to pay the higher cost of foster care.

In essence, the department has so enmeshed itself in fictitious and misleading labels for the sake of reducing welfare costs that it has obfuscated the purpose of the underlying statute: the preservation, so far as possible, of the family unit, and the more fundamental purpose of the preservation of the health of the state's children, the potential leaders of tomorrow.

The judgment of the superior court, declaring Regulation 44-115.611 invalid and enjoining its enforcement, is affirmed.

TOBRINER, J.

WE CONCUR:
WRIGHT, C. J.
MOSK, J.
SULLIVAN, J.

WAITS v. SWOAP
S.F. 23012
S.F. 23013

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8. In testimony at an Assembly Welfare Committee hearing on foster care, September 7, 1972, Mrs. Mary Charles of the Santa Clara County Department of Social Services categorized economic distress as a major contributory factor to family breakdown. She focussed on children living with nonneedy relatives as a "high-risk population group newly created by the State Department of Social Welfare." Mrs. Charles testified that her office labeled this group "high-risk" because "heretofore the homes of relatives had been looked upon as alternatives for foster homes or institutional care for both social and financial reasons. We are already losing some of these relatives as child-caring people; we have been unable to recruit some others who might have been available had their costs of caring for the children been covered. [¶] The reduced payment, $48 per month . . . provides hardly enough money to feed a teenager. It is a tremendous hardship [on these relatives]. . . . The State Department of Social Welfare's Regulation 44-115.611 provid[ing] that the child care of housing and utilities are 'income in kind' contributed by the relatives is simply not realistic." (Pp. 46-47.)

DISSENTING OPINION BY BURKE, J.

It may come as a surprise to the Legislature, and to the taxpayers of this state, that by reason of the majority's holding herein, a *full* welfare grant must be paid to relatives caring for a dependent child, despite the fact that these persons do not themselves qualify for aid (and, indeed, may be wealthy) and despite the fact that they may incur no increased costs whatever in boarding the child. In my view such a result is wholly irrational: Welfare is payable to persons "in need thereof" (Welf. & Inst. Code, § 10000), and a child who is cared for by nonneedy relatives is not an apt recipient of public funds.

As I explained in my dissent in *Cooper v. Swoap, ante,* page ■, the department quite properly has enacted regulations taking into consideration the fact that certain welfare recipients may have regular economic advantages not available to other recipients, advantages which must be evaluated and considered in calculating the size of the welfare grant. The instant regulation (44-115.611) assigns to a child an amount of "in-kind income" to reflect the fact that, unlike other AFDC recipients, he receives free housing and utilities. Under the majority's analysis, such a child must be paid the *full* AFDC grant specified by statute for dependent children. The department's regulation, however, recognizes the impropriety of paying public funds to nonneedy persons and limits the amount of the grant to such persons.

The regulation is based upon the premise that such children commonly reside in a spare, unused room in the home or do not otherwise significantly increase the housing and utilities cost to the relative. The regulations assign a specified value (in dollars per month) to the resources of housing and utilities available to each child living with nonneedy relatives. For example, the combined value of

both items to one child is $67 per month, to two children $87 per month, and to three children $95 per month. (Regs. 44-115.91, 44-115.92.) Regulation 44-115.611 does, however, acknowledge that in some cases the child's presence in the home of nonneedy relatives may actually increase their housing and utilities cost and, accordingly, provision is made for reducing the specified "in-kind income" values to that extent. The excess, if any, of the in-kind income value over the increased cost to the nonneedy relative is considered in-kind income, to be deducted from the AFDC grant specified in section 11450 of the Welfare and Institutions Code.

For example, the grant specified for a family having no outside income and consisting of three needy, eligible persons would be $237 per month. This figure includes, of course, an allowance for housing and utilities. (See Welf. & Inst. Code, § 11452, subds. (1) and (4).) But if these three persons consisted of dependent children living with nonneedy relatives, the regulations would assign an in-kind income to them of $95 per month, on the basis that they are receiving free housing and utilities unavailable to an ordinary needy AFDC family. If, however, the nonneedy relatives had to move to larger quarters to accommodate the children in their care, with a resultant additional housing and utilities expense of $80 per month, only $15 would be deducted from the AFDC grant.

The majority assert that the housing and utilities voluntarily furnished by nonneedy relatives to the dependent children in their care should not, under federal or state law, be considered to be a "resource" or "income" of the child for purposes of reducing the size of the AFDC grant. Yet the cases indicate the contrary rule. First of all, the United States Supreme Court has held that HEW regula-

tions which permit the states to consider currently available "income" or "resources" of a child in determining eligibility and amount of aid "clearly comport" with the federal act. (Lewis v. Martin, 397 U.S. 552, 555; King v. Smith, 392 U.S. 309, 319, fn. 16.)

Lewis held that the states may not *conclusively* presume that a dependent child's needs are reduced by the amount of income available from a "man in the house," (such as a stepfather or other adult male assuming the role of spouse to the mother), whether or not such income is in fact available or actually used to support the child. (397 U.S. at pp. 554-560; see also Jenkins v. Georges, 312 F.Supp. 289; Marotti v. White, 342 F.Supp. 823.) As stated in *Lewis* (pp. 559-560), *"In the absence of proof of actual contribution,* California may not consider the child's 'resources' to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS [man assuming role of spouse]—whatever the nature of his obligation to support." (Italics added.) By clear implication, if a child actually receives income or other resources from a relative or friend, regardless of preexisting support duty, the amount or value thereof may be taken into account in determining aid payments. (See People v. Lockett, 25 Cal.App.3d 433; County of San Diego v. Montgomery, 23 Cal.App.3d 174.)[1]

Certainly, if a dependent child received an outright gift of $50 each month from nonneedy relatives for housing and utilities, that amount could be deducted from the grant

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1. The department has submitted to this court a copy of a letter from Phillip J. Rutledge, Acting Administrator of HEW, dated March 27, 1973, stating that the regulations at issue have been reviewed by HEW and are in conformity with federal law and regulations. We have, in past cases, noted that "HEW's views are, of course, subject to considerable deference by this court." (County of Alameda v. Carleson, 5 Cal.3d 730, 742, fn. 13.)

the child would otherwise receive. No cogent reason appears why a noncash economic benefit (such as free housing and utilities) should not be similarly treated by assigning a cash value thereto and deducting that value from the grant. The term "resources" in the state and federal statutes is broad enough to include such noncash economic benefits, and nothing in state or federal law prevents the department from making a reasonable estimate of the value of those benefits for purposes of adjusting the size of the AFDC grant.

Significantly, plaintiffs have not asserted that the department's "in-kind income" values are unreasonably large. Undoubtedly plaintiffs could have alleged and attempted to prove at trial that the department's estimates of in-kind income (e.g., $67 per month for one child for housing and utilities) are unrealistic or unreasonably large, resulting in an excessive deduction from the AFDC grant. On the present record, however, and in the absence of such a showing, we must assume that the department properly discharged its statutory responsibilities to implement, interpret and make specific the law it enforces (Welf. & Inst. Code, § 10554) and to establish rules and regulations fixing uniform statewide standards for the administration of aid programs (*id.*, §§ 10604, 11452).

Further, as explained above, the department has taken into account the possibility that the presence of a child in the home of a nonneedy relative may increase the housing and utilities expense to the relative, and has provided for an appropriate credit. This aspect of the regulation also appears to comport with federal law, which contemplates that aid payments are to be made not only on behalf of the dependent child, but also "to meet the needs of the relative with whom the dependent child is living." (42

U.S.C § 606, subd. (b).) An actual increase in costs to the relative justifies a corresponding credit to the value of the resources furnished by them. Once again, plaintiffs have not attempted to show that the department has improperly limited the kinds of increased costs which will give rise to a credit against the grant reduction.

Plaintiffs contend that the department has improperly created a rebuttable presumption that the child's presence does not increase the cost of housing and utilities to nonneedy relatives. Plaintiffs suggest that in the ordinary case such costs do exist. Even if we assume, however, that the department's presumption may be unrealistic in some cases, nevertheless it seems reasonable to impose upon plaintiffs the burden of establishing their increased costs for such information is obviously more readily available to them than to the department. (See People v. Gilbert, 1 Cal.3d 475, 484, and fn. 14; Morris v. Williams, 67 Cal.2d 733, 760.) As we noted in *Gilbert,* a case involving similar issues, although conclusive presumptions face frequent constitutional attack (see, e.g., Lewis v. Martin, *supra,* 397 U.S. 552, 554-560), rebuttable presumptions are often sustained on the basis that their effect is not conclusive. We further pointed out in *Gilbert* that "Unquestionably, the man [assuming a role as spouse] and the AFDC family have far better information than is available to the Department of Social Welfare as to how the man actually spends his money. In order to overcome the attendant difficulties in calculating the man's contributions [to the AFDC family], the department could reasonably establish a rebuttable presumption that all the man's income after certain deductions had been given to the AFDC family." By a parity of reasoning, the department should be permitted to establish a rebuttable presumption that the child's presence in the home of nonneedy relatives has not significantly increased their housing and utilities costs.

The majority suggest that the "in-kind income" approach of the department's regulations, being in essence an attempt to adjust aid payments in recognition of the differing needs of various classes of AFDC recipients, improperly alters or amends the fixed statutory schedule of minimum needs set forth in section 11452 of the Welfare and Institutions Code. Yet the schedule of minimum needs in section 11452 is used only for purposes of determining the *eligibility* for aid of a family with dependent children. Regulation 44-115.611 does not purport to affect or alter the statutory standards for eligibility; that regulation only comes into play to measure the amount of aid to be paid to an otherwise eligible recipient or family. And although the regulation does indeed reduce the statutory maximum grant specified in section 11450, such reduction is authorized by the requirement of that section that the recipient's outside "income" (which includes currently used "resources" under § 11008 be deducted from the maximum grant. In other words, by reason of the requirement in state and federal law that an aid recipient's outside income and resources are to be taken into account in determining the size of the grant, the department *is* authorized to consider the "needs" of the recipient, to the extent those needs are reduced by virtue of such income or resources.

The majority assert that the department's regulations conflict with the general policy underlying the federal act to encourage the care of dependent children. The preamble section to the federal act's provisions regarding the AFDC program states that the program was initiated "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation and other services, *as far as practicable under the condi-*

tions in each state, to *needy* dependent children and the parents or relatives with whom they are living . . . ." (Italics added; 42 U.S.C. § 601.) However, contrary to the majority's suggestion, it is not wholly clear that the in-kind income regulations at issue actually discourage nonneedy relatives from caring for dependent children, for such relatives, regardless of their need, do receive an AFDC grant to assist them in such care, a grant which is reduced only to the extent that the specified in-kind values for housing and utilities exceed the additional expenses incurred for those items by reason of the child's presence in their home.

Moreover, as indicated by the italicized language of the federal provision quoted above, it is recognized that practical considerations may justify reasonable limitations upon the amount of aid available to various classes of AFDC recipients. As explained in a recent decision of the United States Supreme Court, the states have considerable latitude in allocating AFDC resources and may establish their own standards of eligibility and level of aid payments so long as no violation of specific provisions of the federal act occurs; there is no requirement in the act that the states must maximize individual eligibility for benefits. (Jefferson v. Hackney, 406 U.S. 535, 541-543.) I find no provision of state or federal law which requires equal treatment of children living, respectively, with needy and nonneedy relatives.

Plaintiffs contend that the department's regulations violate constitutional equal protection principles by providing for a reduced grant to children who live with nonneedy relatives. Plaintiffs evidently complain that the regulations do not take into account the possibility that some children living with needy relatives may have less need for assistance but nevertheless receive a larger aid payment. But as

Jefferson v. Hackney, *supra,* 406 U.S. 535, points out, equal protection principles are not violated merely because a particular classification may be imperfect in some of its applications; so long as the classification has a rational basis and does not result in an invidious discrimination, a state's efforts in allocating assistance benefits are not subject to a "constitutional straight jacket." (*Id.,* at pp. 546-547.) Since budgetary constraints do not allow the payment of the full standard of need for all AFDC recipients, the department properly may conclude that *generally* children living with nonneedy relatives are more able to bear the hardship of a reduced grant than children living with needy relatives. (*Id.,* at p. 549.)

I would hold that the department's Regulation 44-115.611 is not invalid under federal or state law, and that accordingly the trial court erred in prohibiting further enforcement of that regulation.

BURKE, J.

I CONCUR:

McCOMB, J.

COPY

WAITS v. SWOAP

S.F. 23012
S.F. 23013

DISSENTING OPINION BY CLARK, J.

In addition to incorporating by reference the discussion of in-kind income contained in my dissent in *Cooper,* I offer corrections to misstatements in the majority opinion in this case.

The majority states (*ante,* p. ...., fn. 5)* that prior to 1971, AFDC recipients living with nonneedy relatives received the same treatment as all other recipients. This is incorrect. See, for example, Regulation 44-115.162 of 1 July 1967, which specifies: "When a child lives with a nonneedy relative, the amount by which the relative is able and willing to meet the child's total need is net income." This statement was repeated in department regulations issued on 1 December 1967 (44-115.62) and on 1 June 1969 (44-115.72). On 1 July 1970 this language was amended by Regulation 44-115.7 entitled "Contribution by a nonneedy relative. When the contribution made in-kind by a nonneedy relative is expressed in terms of an amount to be applied against total rather than specified items of need in the assistance standard, such amount is net income to the AFDC children. For example, a nonneedy relative specified that the contribution will be equal to all but $50.00 of the child's need. The difference between the child's allowable need and $50.00 is net income to the child." This regulation, renumbered as 44-115.6 on 1 December 1970, was in effect at the time the Welfare Reform Act was adopted. It allowed the nonneedy relative the option of estimating the value of the total support provided to the child, and such value was considered net income to the child. In fact, the 44-115.612 regulation at issue repeats the substance of the regulations of 1 December and 1 July 1970. Thus, the department, in adopting the regulation in issue, was merely continuing the existing state policy of taking into consideration as income the in-kind value of support and maintenance furnished by nonneedy relatives.

The majority intimates (*ante,* p. ....)* that the regulation

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*Majority opinion, page 7, footnote 5.

*Majority opinion, page 12.

at issue is in some way defective in that it reimburses the nonneedy relative only for out-of-pocket expenses. The majority states (*ante,* p. ....)*: "Thus, if the nonneedy relative incurs no *additional* out of pocket expenses, the recipient's income is automatically and conclusively set at the department's allowance figure, *regardless* of the actual value of the housing and utility benefits which a recipient in fact receives." (Fn. omitted.)

The majority's implication is that nonneedy relatives ought to be reimbursed beyond the costs of supporting the recipient. Whether or not providing such a windfall to nonneedy relatives is wise social policy, as the majority evidently believes, it is not the law. Welfare and Institutions Code section 11006 provides: "All money paid to a recipient or recipient group as aid is intended to help the recipient meet his individual needs or, in the case of a recipient group, the needs of the recipient group, and is not for the benefit of any other person."

Unlike the situation in *Cooper, supra,* where the AFDC recipients resided with adult aid recipients and therefore constituted a recipient group, the nonneedy relative is by definition not a recipient and may not be considered part of the recipient group. Section 11006 clearly provides that the grant is not intended to benefit any person outside the recipient group and therefore restricts the nonneedy relative to reimbursement for his out-of-pocket costs.

In summary, the result obtained by the regulation in issue is not only consistent with past and current welfare practice but is required by statute.

I would uphold Regulation 44-115.611.

CLARK, J.

Appendix B

In the Supreme Court of the State of California

In Bank

S.F. 23012
S.F. 23013
Super. Ct. No. 418746

Supreme Court Filed Jul 17 1974 G. E. Bishel, Clerk

William Waits et al.,
Plaintiffs and Respondents,
vs.
David B. Swoap, as Director, etc., et al.,
Defendants and Appellants.

PETITION FOR REHEARING

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STATE LAW AS CONSTRUED BY THE COURT CONTRAVENES PARAMOUNT FEDERAL LAW

Section 11450 provides in part:

> "(a) For each needy family which includes one or more needy children qualified for [AFDC] aid . . ., there shall be paid . . . an amount of aid each month which when added to his *income* . . . is equal to the sums specified in the following table . . . ." (Emphasis added.)

The Court excluded from "income" as used in this section "noncash economic benefits" and the value of "shared housing," in the context of an AFDC recipient who is furnished housing and utilities by a "non-needy" relative.

As so construed, section 11450 conflicts with applicable federal law. 42 U.S.C. 402 (a)(7) provides:

> "(a) A state plan for aid and services to needy families with children must: . . .
>
> "(7) . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the state determines should be considered in determining the need of the child or relative claiming such aid. . . ."[4]

This congressional requirement is implemented by federal regulation 45 C.F.R. 233.20 (a)(3)(ii)(a)(c) which provide:

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4. This statute, and the following quoted regulation were previously cited and discussed in the State's Answer to Petition for Hearing, filed in *CWRO v. Brian*, 11 Cal.3d 237 (1974).

"(a) Requirements for State Plans. A State Plan for . . . AFDC . . . must, as specified below:

"(3) Income and resources: . . . AFDC . . . .

"(ii) Provide that, in establishing . . . the amount of the financial payment:

"(a) All income and resources . . . will be considered in relation to the state's standard of assistance. . . .

"(c) . . . only currently available resources will be considered; . . . ."

The Supreme Court of the United States in *Shea v. Vialpando,* ..... U.S. ....., 129-130, 40 L.ed 2d 120, after considering the import of 42 U.S.C. 402 (a)(7) stated:

"From the inception of the [Social Security] Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered. Congress has been careful to insure that *all* income and resources properly attributable to a particular applicant be taken into account, . . ." (Emphasis in original text.)

In this context, Congress did not define "resources" as used in 42 U.S.C. 402 (a)(7). But in Title XVI, Social Security Act Supplemental Security Income (S.S.I.), Congress explicitly recognized that the provision of housing, support and maintenance constitutes "income" which reduces the federal assistance otherwise payable. 42 U.S.C. 1382 a(2)(A) of Title XVI provides:

". . . that in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind

> from such person, the dollar amounts otherwise applicable to such individual (and spouse) . . . shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph;..."

The concept that housing, support and maintenance constitutes recognized income under Title XVI should equally apply to AFDC Title IV, Social Security Act and specifically be included within "income" as used in 42 U.S.C. 402 (a)(7).

That this same concept should apply to 42 U.S.C. 402(a)(7) is demonstrated by the language in 42 U.S.C. 402 (a)(7)(24), (added by Social Security Amendments of 1972, Act of October 30, 1972, 86 Stat. 1462, 1482, § 414, effective January 1, 1973). Subsection (a)(24) provides:

> "(24) If an [S.S.I.] individual is receiving benefits under . . . [Title XVI], then, for the period for which such benefits are received, such [S.S.I.] individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the [AFDC] family under . . . [Title IV] and his income and resources shall not be counted as income and resources of a [AFDC] family under . . . [Title IV]."

It is presumed that Congress intended subparagraph (a)(24) to have meaning and effect. The obvious effect is to prevent "in-kind" income (e.g., housing, utilities) provided by a recipient of federal S.S.I. assistance to a state AFDC recipient living in his home to be allocated to the AFDC recipient and to be deducted by a state from the AFDC grant otherwise payable.

This analysis shows that section 11450 as construed by this Court conflicts with the mandatory provisions of 42 U.S.C. 402 (a)(7). This conflict between federal and state law confronts the respondent with an extraordinary dilemma since the Legislature has charged him with the duty as Director of the Department of Benefit Payments ". . . to supervise every phase of the administration of aid . . . in order to secure full compliance with the applicable provisions of state and federal laws." Section 10600; *CWRO v. Carleson,* 4 Cal.3d 445, 452-453 (1971). This delegation of authority by the Legislature reflects the ". . . public policy of this state to establish and maintain conformity between the state law and the requirements of the federal act for the receipt of grants-in-aid in support of the state public assistance program." *Pearson v. State Social Welfare Board,* 54 Cal.2d 184, 189 (1960); *Cox v. State Social Welfare Board,* 193 Cal.App.2d 708, 716-717 (1961). The decision in the instant case should therefore be reconsidered in order that conflict between state and federal law can be obviated, and in order that respondent may discharge his statutory duty to harmonize state law with applicable federal law.

Appendix C

AFDC

.6 Nonneedy Relatives

Natural or adoptive parents, stepfathers, or adults whose needs are met through any categorical aid program shall not be considered to be nonneedy relatives for purposes of this section.

.61 Treatment of Contributions

.611 The excess of the in-kind income value for housing and utilities (see .9 below) included in the minimum basic standard of adequate care figure (Section 44-315.511(a)) for the appropriate size Family Budget Unit over the increased cost of housing and utilities to the nonneedy relative caused by the presence of the AFDC child (ren) in his household shall be considered a contribution in-kind to the Family Budget Unit.

.612 If the nonneedy relative wishes to contribute to the support of the child(ren) in his care in excess of the amount computed in .61 above, he may do so by either identifying the need itself to be contributed using .8 below or by specifying an exact dollar amount to be contributed. Any amounts so specified are considered net income to the AFDC child(ren).

• • • • • • •

.9 For purposes of this section, the following shall be considered as the in kind income value of certain items of need for an FBU:

.91 *Housing*

a. one person FBU—$55/per month
b. two person FBU—$74/per month
c. three person FBU—$81/per month
d. four person or larger FBU—$86/per month

.92 *Utilities* (including telephone):

a. one person FBU—$12/per month
b. two person FBU—$13/per month
c. three person FBU—$14/per month
d. four person or larger FBU—$15/per month

.93 *Food*

a. one person FBU—$29/per month
b. two person FBU—$65/per month
c. three person FBU—$83/per month
d. four person FBU—$103/per month
e. five person FBU—$124/per month
f. six person FBU—$145/per month
g. seven person FBU—$161/per month
h. eight person FBU—$177/per month
i. nine person FBU—$193/per month
j. ten person or larger FBU—$209/per month

.94 *Clothing*—$9 for each person per month

Appendix D

Determining Amount of Grant
Child Living With Parent or Relative

44-315.41 ***Child Living With Parent or Relative (Basic Cash Grant)***

Calculate the amount of the basic cash grant as follows:

.411 **Based on the size of the FBU (see Section 44-213.3) find the maximum aid in the following table:**

Size of FBU	Maximum Aid
1	$129
2	212
3	262
4	311
5	355
6	400
7	438
8	477
9	516
10 or more	554

Appendix E

§ 11450. Table of amount of aid: Increases or decreases commensurate with federal contributions: Payment for children receiving "foster care": Special needs allowances

(a) For each needy family which includes one or more needy children qualified for aid under this chapter, except as provided in Section 11403, there shall be paid, notwithstanding minimum basic standards of adequate care established by the department under Section 11452, an amount of aid each month which when added to his income, exclusive of any amounts considered exempt as income or paid pursuant to subdivision (d) of this section or Section 11453.1, is equal to the sums specified in the following table, as adjusted for cost-of-living increases or decreases pursuant to Section 11453:

Number of eligible needy persons in the same home	Maximum aid
1	$117
2	192
3	237
4	282
5	322
6	362
7	397
8	432
9	467
10 or more	502

If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above

table shall be increased or decreased by an amount equal to such increase or decrease by the United States government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453.

(b) For children receiving foster care who are qualified for aid under the provisions of this chapter, except as provided in Section 11403, there shall be paid the sum necessary for the adequate care of each child, but not to exceed in any month the product of eighty dollars ($80) multiplied by the number of children in each county receiving foster care. The state shall pay 67.5 percent and the county shall pay 32.5 percent of the aid furnished for the adequate care of such children.

The maximum amount of aid payable under the previous paragraph shall be increased up to one hundred dollars ($100) per month in assistance in those cases and during such times as the United States government contributes.

(c) As used in this chapter, "foster care" means care in a boarding home or institution.

(d) (1) In addition to the amounts payable under subdivision (a) of this section and Section 11453.1, a family shall be entitled to receive an allowance for recurring special needs not common to a majority of recipients. The county shall pay the full cost of the additional aid furnished needy families pursuant to this subdivision after first deducting therefrom any funds received from the federal government. Such recurring special needs shall include but not be limited to special diets upon the recommendation of a physician, and unusual costs of transportation,

laundry, housekeeping service, telephone, and utilities not to exceed the minimum basic standards of adequate care.

(2) A family shall also be entitled to receive an allowance, at county expense after first deducting therefrom any funds received from the federal government, for nonrecurring special needs caused by sudden and unusual circumstances beyond the control of the needy family; provided, however, that such needs shall not be taken into consideration in determining the eligibility of the family for aid.

(3) The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this subdivision.

(e) Except for the purposes of Section 15200, the amounts payable to recipients pursuant to Section 11453.1 shall not constitute part of the payment schedule set forth in subdivision (a) of this section.

The amounts payable to recipients pursuant to Section 11453.1 shall not constitute income to recipients of aid under this section.

Appendix F

45 C.F.R. 233.20(a)(3)(ii)

"(a) Requirements for State Plans. A State Plan for . . . AFDC . . . must, as specified below:

"(3) Income and resources; . . . AFDC . . .

"(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; (b) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; . . ."

Appendix G

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Superior Court of the State of California
For the County of Alameda

No. 418748

William Waits, etc., et al.,

Petitioners,

vs.

Robert B. Carleson, etc., et al.,

Respondents.

DECLARATION OF ANTHONY MOSS

I, Anthony Moss, declare as follows:

I am the duly appointed Chief of the Estimates Bureau of the Department of Social Welfare of the State of California. Estimated data concerning the categorical aid programs administered by the Department of Social Welfare is compiled under my supervision, direction and control. One of these programs is the AFDC-FG program.

Based upon such data, it is my opinion that the costs for the fiscal year 1972-1973 that will be incurred by the United States, the State of California and the various counties of the State if they are enjoined from applying Manual of Policies and Procedures Section 44-115.611 will be

$4,623,600.00. Of this sum, the Federal Government will incur a cost of $2,283,700.00 and the State of California will incur a cost of $1,579,400.00 and the various counties will incur a total cost of $760,500.00.

This section concerns children on Aid to Families with Dependent Children (AFDC) who are living with a non-needy relative other than a parent, a stepparent or an adult who is, himself, a recipient of one of the categorical aids. If the actual amount it costs the non-needy relative to have an additional person in his home is less than the amounts allowed in the AFDC need standard for housing, utilities, etc., it requires that the excess be treated as "in-kind" income to the AFDC child.

The basis of my opinion is as follows: It was found that the regulation applied to almost five percent of the AFDC-FG cases or about 21,000 cases. Of these, slightly more than two-fifths (8,360) had grant reductions because of in-kind income. Since this information was based on data collected in October, November, and the first few days of December 1971, it is possible that the proportion of cases with in-kind income since increased as counties have had more time to contact non-needy relatives.

The average amount deducted as "in-kind" income is about $58 per case for the 8,360 cases with such deductions. Because net income, in cash or in-kind, is deducted from the need standard to arrive at the AFDC grant, the average grant reduction would be about $46 a case per month.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 1972 at Sacramento, California.

/s/ ANTHONY MOSS
Anthony Moss
Chief of Estimates Bureau
Department of Social Welfare

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In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. LAURA COOPER, et al., *Respondents.*	NO. 74-311
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WAITS, et al., *Respondents.*	NO. 74-312

Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

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Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

PRELIMINARY STATEMENT

The principal issue in these three cases is common to and determinative of each case. Therefore, we have chosen to submit a consolidated Brief In Opposition pursuant to Rule 23(5). Respondents in all three cases have common counsel. Respondents hope that this procedure will not only enhance the Court's understanding of the issues, but will also conserve its time.

Initially, respondents discuss the common issues in Point I. Then in Point II we discuss those issues that are peculiar to one or two (but not all) of the cases. Finally, we discuss Petitioners' basic claim that the construction of state law by the Court below in each of the three cases renders the state AFDC plan out of conformity with federal law. We suggest that there is no present need for the Court to address itself to these issues and that the Court should await a determination of nonconformity by the agency principally responsible for such determinations, the U.S. Department of Health, Education and Welfare.

REASONS WHY THE WRITS SHOULD BE DENIED

I. Petitioners' "Noncash Economic Benefit" Policy Is Completely at Variance with This Court's Concept of the AFDC Flat Grant.

In the mid-1960's, HEW began encouraging the states to simplify their AFDC standards of need.[1] Until this time standards of need were computed on a highly individualized basis attempting to recognize the peculiar circumstances of each family. One result was that the need standards were exceptionally complicated and difficult to use, even for experienced caseworkers. In one sense, these individualized need standards expressed a preference for individual equity over administrative efficiency. These highly individualized systems were also criticized as placing too much discretion, and therefore, power subject to abuse, in low-level welfare workers. This tended to degrade recipients because it made them particularly vulnerable to behavior control tendencies in some social workers. *Rosado v. Wyman* (E.D.N.Y. 1969)

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1. The "standard of need" is "a yardstick for measuring who is eligible," *Rosado v. Wyman* (1970) 397 U.S. 397, 408. *See* Gladys O. White, "Simplified Methods For Determining Needs," U.S. Dept. of HEW (1964).

304 F. Supp. 1356, 1369, *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

Simplification, therefore, was viewed as a means for enhancing individual dignity, *ibid*, and "as an advance in administrative efficiency." *Rosado v. Wyman* (1970) 397 U.S. 397, 417; *see further, id.*, 416-17; *id.*, O.T. 1969, No. 540, Memorandum For The United States As Amicus Curiae, 10-11. The most extreme form of simplification is one in which all the diverse elements of an individualized system are consolidated by a statistically weighted averaging. The result is a single sum applicable to all families of a given size. This is called a "flat grant maximum" system. *Rosado v. Wyman, supra*, 397 U.S. at 417.

These cases present the principal question of whether a state, after averaging the needs of all recipients under an individualized system—high need, low need and all in between—*must thereafter* continue to treat low-need families on an individualized basis. A highly simplified example will put this question in its proper perspective.

Assume that a hypothetical state had three AFDC families with four recipients in each family. Under its individualized needs system, family A's monthly needs were determined to be $200, family B's, $250, and family C's, $300. If the state converted to a flat grant system, the flat grant would be $250. Must the state then pay B and C $250 but pay A only $200 since A's needs are still only $200? That is what petitioners contend in the three instant cases.

A. IN 1971, CALIFORNIA CONVERTED FROM AN INDIVIDUALIZED AFDC PAYMENT SYSTEM TO A FLAT GRANT.[2]

To fully understand the respective contentions of the parties, a brief review of the California AFDC payment struc-

2. The most extensive exposition of the statutory background by the Court below is in *Swoap v. Cooper*, Pet., App., 5-13.

ture is necessary. Prior to 1971, families of equal size received greater or lesser grants depending upon several variable factors: (1) the age of each child; (2) the sex of each child; (3) the county of residence; (4) the number of adults (one or two) in each family; (5) the *actual* expenditures for rent (however, *actual* expenditures were recognized only up to specified maximums which varied according to the size of the family and further varied according to the county of residence); and (6) whether or not a child was unborn or in being. These factors, and the amounts applicable to each, had long been established by administrative regulations of the Director of the state welfare agency.

When a family applied for AFDC (and every month after a family was determined eligible), the pertinent factual circumstances of *each* family would be determined in order to apply each of the foregoing factors. When this review was completed, the result was called the family's "need". This system resulted in considerable variation.[3] For example, an AFDC mother residing Sacramento County with her three daughters, all of whom were under six years of age, would have total monthly needs (exclusive of housing) of $183.30. On the other hand, a mother living with three teenage sons in Sierra County would have a similar monthly needs figure of $305.05. Assuming that both paid rent equal to the applicable maximums for four-person housing in their counties ($120 and $110, respectively) total needs would be $303.30 and $415.05.

After the "needs" computation was completed, the family's income would be computed and the total subtracted

3. *Cf., Rosado v. Wyman* (E.D.N.Y. 1969) 304 F.Supp. 1356, 1365-67, *rev'd on other grounds,* 414 F.2d 170 (2d Cir. 1969), *rev'd* 397 U.S. 397 (1970).

from total "need." The difference, called "unmet need", would then be paid as an aid grant.[4] Thus, there was wide variation in aid grants to families of equal size. If each of the four-person families in the foregoing example had a monthly income of $200, the Sacramento County family would receive a grant of $103.30 while the Sierra County family would receive $215.05.

An important aspect of this system was that any attempt to reduce housing expenditures, and to reallocate the resulting savings to other needs such as food or clothing, would be futile. The move to cheaper housing would be met with a *pro tanto* decrease in grant. In each of the foregoing examples, a $25 monthly reduction in rent would reduce the grant by a full $25 (to $78.30 and $90.05, respectively).

In August, 1971, the California Legislature enacted the Welfare Reform Act of 1971. Among its many provisions, the Act "replaced this cumbersome system," *Swoap v. Cooper,* Pet., App., 5, with a flat grant system by completely rewriting the grant payment statutes, Welf. & Inst. Code §§ 11450(a) and 11452.[5] "The chief purposes . . . were to streamline the administration of the welfare program and to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities." *Id.,* App., 6.

> "The Legislature abolished the administrative allowances and need figures and took upon itself the tasks

4. In certain cases of high "needs" and little or no income, "unmet need" might exceed statutorily imposed maxima which varied only according to family size. In such case, "unmet need" would be paid only up to the statutory maximum.

5. The former versions are set out in *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 449, nn. 6, 8. The present grant statute, § 11450, is set out in *Swoap v. Cooper,* Pet., App., 45-47. The present needs statute, § 11452, is set out in Exhibit "1" hereto.

> of determining the minimum need level of recipients (Welf. & Inst. Code § 11452). The Legislature itself then set *uniform welfare payments* (Welf. & Inst. Code § 11450) *based on a fair averaging of all AFDC grants*, a method of welfare benefit computation recently approved by the United States Supreme Court in Rosado v. Wyman (1970) 397 U.S. 397." *Id.*, 5-6 (emphasis in original).

Unlike its predecessor, the new § 11450 no longer looked to the "needs" of any particular family in computing a grant.[6] The process became far, far simpler: the grant to *any* and *every* family would be the difference between available income and a statutorily fixed amount based *solely* on the number of eligible, needy persons in the household. The touchstone is that *all families of equal size are to be treated equally.*

The method by which the new amounts in §§ 11450(a) and 11452 were derived was simple arithmetic averaging of the varying amounts received by families of equal size under the prior method. *Swoap v. Cooper,* Pet., App., 11. True, payment of the same amounts to all families of equal size may mean that some are able to cope more easily than others. (Consider an AFDC mother with three infant children compared to another with three teenagers.) But this is simply the result of averaging. As this Court has ob-

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6. The "needs standard" statute, § 11452, uses the term, "minimum basic standards of adequate care" for "needs." The amounts applicable to families of specified size are set forth in the statute. These amounts are relevant only to *initial* eligibility. See *Rosado v. Wyman* (1970) 397 U.S. 397, 408; *Villa v. Hall* (1972) 7 Cal.3d 926, 928, *on remand from Hall v. Villa* (1972) 406 U.S. 965.

The "grant" statute, § 11450(a), specifies that "there shall be paid, notwithstanding minimum basic standards of adequate care . . . an amount of aid each month which when added to . . . income . . . is equal to the sums specified in the following table. . . ." (Emphasis added.)

served, "obviously, such averaging may affect some families adversely and benefit others." *Rosado v. Wyman, supra,* 397 U.S. at 419. Thus, as in every averaging, all those families that were receiving *more* than the average under the old system *lost* benefits while those formerly receiving *less* than the average gained thereby. *See further, Rosado v. Wyman, on remand,* (E.D. N.Y. 1970) 322 F.Supp. 1172, 1189.

B. AFTER THE CALIFORNIA LEGISLATURE ADOPTED A COMPREHENSIVE FLAT GRANT SYSTEM, PETITIONERS ADOPTED POLICIES REDUCING GRANTS TO CERTAIN FAMILIES WHO SHARED HOUSING WITH OTHER PERSONS CONTENDING THAT SUCH FAMILIES HAD LOWER NEEDS. SUCH A POLICY VIOLATES THE FUNDAMENTAL LOGICAL AND MATHEMATICAL PREMISE OF A FLAT GRANT.

Three classes of "gainers" in the averaging process are those represented by the respondents in each of the three Petitions before the Court. After the Welfare Reform Act of 1971 became effective, petitioner SWOAP's predecessor issued a series of regulations which reduced the grants otherwise payable to these several categories of "gainers."

First, a regulation, EAS § 44-115.9, was adopted establishing "allowances" for rent, utilities, food and clothing which varied according to family size. (See *Brian v. CWRO,* Pet., App., 34-35 where the regulation is set out in full.) Then, three other regulations, those here at issue, were adopted which established three slightly varying schemes to utilize this basic regulation to bring about grant reductions.

1. The "Flat Grant" in Swoap v. Cooper.

The principal case of this trilogy, *Swoap v. Cooper,* involves EAS § 44-115.8. It applies when any AFDC "child resides with an adult aid recipient. . . ." *Id.,* Pet. 3. An "adult aid" recipient is defined as recipient of the benefits

of the three "adult" public assistance programs under the Social Security Act of 1935.[7] For example, an AFDC mother and her two children may share housing with the children's elderly grandmother. Assume that in such a case the total rent and utility costs were $100. The regulation then requires that the *pro rata* share of the *actual* housing and utilities costs of the AFDC unit, $75, be compared to the EAS § 44-115.9 "allowance." For an AFDC family of three, the "allowance" is $104. *Brian v. CWRO,* Pet., App., 34. Thus, the "allowance" exceeds the *pro rata* share by $29. "[I]f the allowance exceeds the [*pro rata*] share of the *actual* cost of housing and utilities (including telephone), then the excess shall be countable against the . . . maximum aid payment *as income.*" *Swoap v. Cooper,* Pet., 3-4 (emphasis added). In this example, the amount of "income" is $29. Thus, assuming no "real" income, the otherwise payable grant of $235 would be reduced to $206.

The asserted rationale for this policy is that these families do not "need" as much as families who are not sharing housing and utilities with an "adult aid" recipient. The amounts that the latter families "need" is set forth by regulation in EAS § 44-115.9; those amounts represent the average *actual* expenditures of those families for housing and utilities.[8]

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7. Old Age Assistance (OAA), title I, 42 U.S.C. §§ 301-06, Aid to the Blind (AB), title X, 42 U.S.C. § 1201-06 and Aid to the Totally and Permanently Disabled (ATPD), title XIV, 42 U.S.C. §§ 1351-55; each of these programs has been succeeded by the new combined federally administered income maintenance program for the aged, blind and disabled, the Supplemental Security Income (SSI) program, P.L. 92-603, §§ 301-03, 86 Stat. 1465-78, 42 U.S.C. §§ 1381-83c.

8. The factual derivation of EAS § 44-115.9 is discussed in *Swoap v. Cooper,* Pet., App., 24, n.2 (Burke, J., dissenting).

The basic flaw with such an approach is that it attempts to preserve the cake while at the same time strives to consume it. In short, it exacts a double penalty. An average, by definition, reflects the individualized needs of "high need" and "low need" families. Thus, after an averaging, "high need" families are penalized since they received a higher grant before the implementation of a flat grant system.

Curiously, all of the litigation over the conversion to flat grants by several states following this Court's *Rosado* decision involved challenges by "losers" in the averaging process complaining of the inclusion of "gainers" in the striking of the average. Generally, these litigants objected to the inclusion of families whose rental needs had been determined (as in California) on an "as-paid" basis and: (1) who lived in public housing and who therefore paid artificially low rents, *New Jersey Welfare Rights Organization v. Cahill* (D.N.J., 1972) 349 F.Supp. 501, 511, *aff'd*, 483 F.2d 723, 727 (3rd Cir. 1973), *Roselli v. Affleck* (D.R.I. 1974) 373 F.Supp. 36, 44-45; (2) who paid no rent at all, *Johnson v. White* (D.Conn. 1972) 353 F.Supp., 69, 78; (3) who lived in rural areas and paid lower rents in comparison to urban areas, *New Jersey Welfare Rights Organization v. Cahill, supra,* 349 F.Supp. at 511; or, (4) who shared lodging with other non-AFDC persons, *id.*, 75, 77-78, *Roselli v. Affleck, supra,* 373 F.Supp. at 46-47. In each case, the courts held that there was nothing legally improper in such a method because such a result was inherent in the nature of the statistical process. As the Third Circuit said in *New Jersey Welfare Rights Organization v. Cahill, supra,* 483 F.2d at 727:

> "The thrust of these arguments is that any averaging process is 'unfair' to many welfare recipients. While

> it is conceded that the result of averaging may reduce welfare payments to many families and increase the grants to others, [42 U.S.C.] § 602(a)(23), as interpreted by *Rosado* [397 U.S. 397] does not proscribe such a result."

Now, however, petitioners seek to enforce a double penalty by recognizing only the reduced needs of "lower need" families which have already been recognized in the establishment of the average. The Court below concluded that the imposition of this double penalty was inconsistent with the intent of the California Legislature in establishing a flat grant system:

> "In calculating the various flat grant figures included in the schedule of section 11450, the Legislature averaged the diverse needs of *all* AFDC recipients; this averaging took into account the savings accruing to some recipients because of shared housing, as well as the many factors, such as specialized housing or utility needs, which resulted in higher housing costs for other recipients." *Swoap v. Cooper,* Pet., App., 11 (emphasis in original).

Of course, there is nothing that requires a state which adopts a "flat grant" approach to include *all* needs in the averaging process or to include all variations of a particular need. For example, all needs could be averaged *except* housing, which could continue to be allowed "as paid". This would result in lower grants to those who share housing.[9] Or, the housing needs of only those families which had been living in independent living arrangements could be averaged; those in shared housing arrangements could continue to be treated individually. Petitioners contended below that this is what was done in California. However, based upon exhaustive analysis of the legislative history, the Court

9. Or for those who live in public housing, or who live in rural areas, or who have free housing.

below concluded that "there is absolutely nothing to support such a contention." *Swoap v. Cooper,* Pet., App. 11, n. 13; *see also, id.,* 8-10. The Court below therefore held that "[b]ecause the effects of shared housing have already been considered in establishing the basic grant figures . . . the challenged regulations [EAS § 44-115.8] . . . would impose an unfair 'double deduction' on AFDC recipients who happen to share a household with a recipient of adult aid." *Id.,* 11-12.

2. The "Flat Grant" In Brian v. California Welfare Rights Organization.

The circumstances of the second case in the trilogy, *Brian v. CWRO,* also involved another category of "gainers" in the averaging process, families with unborn children. Since 1949, California has defined the term, "needy child", to include an unborn child; there is no disagreement between the parties on this score.[10]

Prior to the 1971 conversion to a flat grant, the existence of an unborn child increased the family's "needs" by only a flat $21 per month. *Brian v. CWRO,* Pet., App., 4. This amount was less than would be the result if the child was in being because all of the other variable need factors (age, sex, county of residence, etc.) were inapplicable to this special situation. Therefore, after the averaging process leading to the flat grant, this class of families would tend to be "gainers". Upon conversion to the flat grant, the unborn child was treated for grant computations as equivalent to a child in being. Thus, prior to her pregnancy, respondent SHELTON, her husband and their young son, Christopher, consisted of a three person family eligible for a

10. Thus, this case does *not* present the Court with the question of whether or not 42 U.S.C. § 606(a) requires inclusion of unborn children. *Cf. Alcala v. Burns,* U.S. Sup. Ct., O.T. 1973, No. 73-1708; *Doe v. Lukhard,* U.S. Sup.Ct., O.T., 1973, No. 73-1763; *Carver v. Hooker,* U.S. Sup.Ct., O.T. 1974, No. 74-242.

three-person family grant of $235 monthly. In early April, 1972, respondent SHELTON became pregnant; her family thereafter consisted of four persons eligible for the full four-person $280 grant as if the child she was carrying was in being.

Later in May, 1972, petitioner SWOAP's predecessor implemented a policy whereby an unborn child was considered to be receiving free rent and utilities owing to its residency within its mother's womb. The full "in-kind income allowances" of EAS § 44-115.9 for these items of need for one person were computed. The total was $67.[11] This was subtracted from the four-person grant of $280 thus leaving the family with just $213, $22 *less* than the $235 the family received *before* respondent SHELTON became pregnant. In July, 1972, the policy was changed so that the "in-kind income" would equal the increment to the next higher-person grant level; in the case of the SHELTON family, that increment is $45 ($280-235). In effect, the unborn child would no longer be recognized as eligible for a grant although this result would be reached after traveling an unusual, albeit imaginative, route.

On August 10, 1972, this action was commenced as an original mandamus proceeding in the California Court of Appeal seeking that Court's discretionary assumption of jurisdiction pursuant to Art. VI, § 10 of the California Constitution. One argument asserted was that both state and federal law required inclusion of an unborn child in the family grant (the federal law arguments were similar to the arguments made by the recipients in the cases cited in n. 10 *supra*) and that the "in-kind income" notion completely thwarted the policies inherent in such requirements. Secondly, it was asserted that the "in-kind income" notion

11. This total is less than the amounts in the version of EAS § 44-115.9 set forth in *Brian v. CWRO*, Pet., App., 34, since the amounts have been updated since May, 1972.

was fundamentally at odds with the principle of a flat grant since the lower need families with unborn children under the pre-1971 scheme were in fact included in the averaging process. Six days after the action was filed, a regulation, EAS § 44-115.95, was adopted which again changed the details of computing the precise amount of "in-kind income". (It is set forth in *Brian v. CWRO,* Pet., App., 32.) Henceforth, it was determined by the incremental values expressed in the "allowances" regulation, EAS § 44-115.9, of a family equal in size to the members in being compared to a family with one or more person. (See *Brian v. CWRO,* Pet. App. 13, for an actual application of the new process in operation using the circumstances of the SHELTONs.) Because of the mathematical relation of the values in EAS § 44-115.9, the amount of the "in-kind income" in all cases would be such that a family would have a $10 grant increase whenever an AFDC mother became pregnant.

Respondents contended that this practice was completely at variance with the fundamental mathematical premise of a flat grant: some gain and some lose but all families of equal size whose individual circumstances were taken into consideration in striking the average are to receive the same grant amount. Petitioners replied with the contention that the economic benefit of the prenatal lodgings constituted "income" or "resources" which, pursuant to state and federal law *must* be subtracted from the maximum grant. Without directly addressing respondents' arguments on the nature of a flat grant, the Court below rejected petitioners' "income" or "resources" contentions as wholly unsupported by state or federal law. *Brian v. CWRO,* Pet., App., 7-8.[12]

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12. The Court in its subsequent opinion in *Cooper,* which does treat the flat grant issues, recognized the flat grant issue as common to *Brian v. CWRO. Swoap v. Cooper,* Pet., App., 1, n.1. *See also, id.,* 16, n.16.

3. The "Flat Grant" in Swoap v. Waits.

Similarly, the *Waits* class of children is another group of "gainers" in the averaging process; they are children who have been orphaned or abandoned and who are not living with their parents, but are living with "non-needy caretaker relatives."

To be a "caretaker relative," one must be a person related to the child to the degree specified in § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such as a grandmother, aunt, brother, etc. To be "non-needy" the income and resources of such relatives must be in excess of the increment in the income limit applicable to a family equal in size to the children in question *plus* the non-needy caretaker relatives. For example, respondent BROWN and his wife are the caretaker relatives of their two minor nieces and nephew. The income limit applicable to the three children is $235 per month. If the BROWNs are added, the family becomes a five-person family with a grant of $331. Hence, if the BROWNs' own income exceeds $96 per month ($331 —235) they are considered to be "non-needy" and therefore are not eligible for a grant.

Prior to the 1971 conversion to the flat grant, children living with non-needy caretaker relatives had their housing needs computed on the same basis as children living with recipients of "adult aids," i.e., the *Cooper* class. That is, their housing needs were equal to their *pro rata* share of the household's total shelter costs, limited only by the maximum allowances applicable to a family of equal size. *Swoap v. Waits,* Pet., App., 5, n. 5.

For example, if four needy dependent children were living with their non-needy aunt and uncle in Sacramento County, and the total household shelter costs were $150, the children's *pro rata* share would be $100 (two-thirds of $150). This full amount would be allowed as shelter need since it would be below the limit for a four-person family.

The average needs of the class would tend to be less than those applicable to families of equivalent size living independently since the latter do not enjoy the "economies of scale" which exist when housing is shared. Thus, this class of children would tend to be "gainers" in the averaging process.

Upon conversion to the flat grant in 1971, the newly adopted regulation challenged herein, EAS § 44-115.611 (set out in *Swoap v. Waits,* Pet., App., 26), brought about substantial grant reductions to the *Waits* class of children. The reasoning underlying this regulation is as follows:

1. These children are "less needy" than other children because they receive free rent and utilities from their non-needy caretaker relatives;

2. The rent and utilities they receive are free because, as the Court below held, the regulation *"conclusively presumes* that such relatives, by agreeing to take such children into their homes, are both willing and able to provide the children with free housing and utilities." *Id.,* at 6 (emphasis in original).[13]

3. Accordingly, the full value of the housing and utility "allowances" of EAS § 44-115.9 is to be subtracted from the applicable grant maximums.[14]

This brought about substantial grant reductions. For example, respondent LUCEY's grandchild's monthly grant was reduced from $115 to $48; the three children living with

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13. The conclusive nature of this presumption is treated separately below. Basically, respondents contend that it violates both a federal regulation as well as the Due Process Clause of the Fourteenth Amendment.

14. The effect was mitigated slightly if, and to the extent that, the presence of the children caused increases in the cost of housing and utilities. For example, if larger quarters had to be obtained or if the children used more water than otherwise.

respondent BROWN had their $235 grant reduced to $140; and, respondent WAIT's three grandchildren and three great-grandchildren had their $360 grant reduced to $259.

The Court below held that EAS § 44-115.6, which brought this all about, was:

> "simply another variation on the department's 'non-cash economic benefit' theme, a theme which, as explained in *Cooper*, is fundamentally incompatible with the 'flat grant' system of welfare benefits adopted by the Legislature in 1971. Thus, although the instant regulation seeks to reduce welfare payments on the basis of reduced housing and utility needs of recipients living with non-needy relatives, such reduced needs, if they in fact exist, have already been taken into account by the Legislature in computing the flat grant figures of section 11450. Consequently, if approved, the challenged regulation would in reality effect an improper 'double deduction' of welfare benefits for those recipients who happen to live with non-needy relatives." *Id.*, at 5.

C. PETITIONERS' CONTENTION THAT THE "NONCASH ECONOMIC BENEFITS" MEASURED BY THEIR REGULATIONS CONSTITUTE "INCOME" WITHIN THE MEANING OF SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT IS WHOLLY UNSUPPORTED BY THE STATUTE, ITS LEGISLATIVE HISTORY OR THE THIRTY-FIVE YEARS OF ADMINISTRATIVE PRACTICE UNDER THE STATUTE.

In each of the three cases, petitioners had one basic response to the argument that individualized treatment of classes of "gainers", after conversion to a flat grant, violated the fundamental logical and mathematical premise of such a grant system. Petitioners said that notwithstanding the California Legislature's intention that these classes of recipients receive *full* grants, the supervening will of Congress embodied in § 402(a)(7) of the Social Security

Act, 42 U.S.C. § 602(a)(7),[15] rendered the State Legislature's will nugatory.[16]

Petitioners place primary reliance upon the § 402(a)(7) phrase "income and resources". Great emphasis is placed upon the contention that *all* "income and resources" must be considered. This point we readily concede; that is not the question. The question is whether these "noncash economic benefits" were intended by Congress to be "income and resources" in 1939 when the statute was enacted. *See* Act of Aug. 10, 1939, c. 666, § 401, 53 Stat. 1379. There is a very good reason why petitioners have not cited to this Court (or to any of the courts below) pertinent legislative history, HEW regulations (or other agency policy statements), case authority or another state's practice. The reason is that none of these exist. Petitioners argue, *ex cathedra,* that these "noncash economic benefits" are "income" or "resources" (always using the terms interchangeably) when the four-decade history of the public assistance titles of the Social Security Act demonstrates only that these notions have *always* been treated, if treated at all, as aspects of a "need" determination, not as an "income" or "resource" concept.

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15. The section provides that:
"(a) A state [AFDC] plan . . . must: . . .
"(7) . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of a child claiming [AFDC] . . . in determining the need of the child . . . claiming such aid. . . ."

16. Petitioners also made an alternative argument that these "noncash economic benefits" were income as a matter of *state* law. In each case, the arguments were rejected. *Swoap v. Cooper,* Pet., App., 13-17; *Swoap v. Waits,* Pet., App., 6; *Brian v. CWRO,* Pet., App. 7-8. Obviously, these interpretations of state law are not at issue before this Court. *Cramp v. Board Public Instruction* (1961) 368 U.S. 278, 281; *Henry v. Mississippi* (1965) 379 U.S. 443, 446-47.

As noted above, the touchstone of a flat grant system is that a family's grant is computed without regard to that family's *individual* needs. Since the California Legislature had withdrawn the power from petitioners to adopt regulations establishing needs, lower needs can no longer form the rationale for a lower grant. In order to circumvent this barrier, "needs" concepts were transmuted by petitioners into the concepts of "income" or "resources" by mere regulatory fiat. The Court below said in response:

> "The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortued concept of 'income' in an attempt to camouflage an impermissible administrative reevaluation of AFDC recipients' needs. An analysis of the complexities of the department's novel determination of 'income' is reminiscent of a journey into the fictional realms visited by Alice through the looking glass. In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, 'When I use a word, it means just what I choose it to mean—neither more nor less.' " *Swoap v. Cooper*, Pet., App., 21.

Petitioners' sole argument[17] in support of their contention that these "noncash economic benefits" are "income and resources" rests upon an analogy to § 1612(a)(2)(A) of the Social Security Act, 42 U.S.C. § 1382a(a)(2)(A).[18] That

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17. In each of their petitions, petitioners also quote out of context two sentences from this Court's recent opinion in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup. Ct. 1746, 1754. These two sentences merely state what respondents have repeatedly conceded: income must be determined *individually* and *all* income must be considered. The Court in *Shea* was not assaying the question of what is or is not income. That is the question that these cases raise.

18. In each of their Petitions, this statute is erroneously cited as 42 U.S.C. § 1382(a)(2)(A).

statute, first enacted on October 30, 1972, Public Law 92-603, § 301, 86 Stat. 1468, provides that an aged, blind or disabled recipient of Supplemental Security Income (SSI) benefits, who is "living in another person's household and *receiving* support and maintenance in-kind from such person" (emphasis added) shall be subject to a grant maximum which is one-third lower than otherwise "in lieu of including such support and maintenance in the unearned income of such individual. . . ." In other words, instead of making a determination of the actual cash value of "support and maintenance" (defined as "room and board," 20 C.F.R. § 416.1125(a), 38 Fed.Reg. 27406, Oct. 3, 1973; 39 Fed. Reg. 3674, January 24, 1974) in each case, a mechanical one-third grant reduction is made in all cases. But this rule applies only when an SSI recipient is *receiving* support and maintenance from another. It does *not* apply when an SSI recipient is *sharing* housing with another and enjoying the noncash economic benefits of economies of scale which exist when housing is shared. In that case, the recipient is *not* considered to be *receiving* anything from his or her roommate. Social Security Admin., CLAIMS MANUAL § 12237(b). It is that analogy which is most appropriate to the instant cases, an analogy wherein no "in-kind income" is considered to exist.

One important point should be made clear. Respondents have no quarrel with the notion of in-kind income. For example, a recipient who is given a TV set that has a market value of $200 receives in-kind income of $200 since the property can be converted to cash. Under the Internal Revenue Code, it is only when goods or services are received which have a fair market value that the value must be included as income. 26 C.F.R. § 1.61-2(d). An individual who saves on rent by sharing housing is not taxed on the

amount of the savings. The Court below pointed out this distinction as follows:

> "[U]nlike true 'in-kind income', the department's 'economic benefit' concept does not reflect *actual* income (commodities or cash) received by a recipient, but instead attributes 'constructive' income to a recipient who, through such economizing conduct as sharing housing, manages to spend less money monthly than the department's hypothesized average. A recipient who saves on housing costs by sharing a household with others, and who in the department's eyes thereby realizes 'noncash economic benefits,' is a far cry from a recipient who receives free housing (i.e., actual 'in-kind income income') or cash from a willing and able donor." *Swoap v. Cooper,* Pet., App., 20, n. 19 (emphasis in original).

In short, petitioners can point to absolutely nothing in federal or state law, other than the *ex cathedra ipse dixit* emanating from their regulatory pen, that *compels* California to evaluate the "noncash economic benefit" that flows from shared housing and to deduct the assigned value as income from AFDC grants.

II. Other Issues Not Common to the Three Cases.

In addition to those issues discussed above which are common to all three cases, the Court below passed upon several other issues which present federal questions. The analysis of these issues demonstrates that the rulings below do not bring California's AFDC plan into conflict with federal law but instead they bring it into conformity with that law.

These other issues only involve *Swoap v. Cooper* and *Swoap v. Waits.* First we will address an issue common to them both and then issues unique to each.

A. EVEN IF THE "NONCASH ECONOMIC BENEFITS" OF SHARED HOUSING COULD PROPERLY BE CONSIDERED "INCOME," THE REGULATION WHICH MEASURES ITS VALUE IS INVALID SINCE IT DOES NOT MEASURE THE ACTUAL VALUE; INSTEAD, IT ASSIGNS A FICTIONAL, STANDARDIZED VALUE THAT VIOLATES FEDERAL LAW.

Assuming that the "noncash economic benefit" of shared housing must be considered to be income under § 402(a)(7), EAS § 44-115.9 is invalid since it does not measure the *actual* value to the recipient in the individual case. Rather, it uses a standardized value applicable in all cases in complete disregard of the individual circumstances of each case. (It is based upon a 1970 survey; see *Swoap v. Cooper,* Pet., App., 24, n. 2.) HEW's regulations provide that "only such net income as is *actually available* for current use on a regular basis will be considered. . . ." 45 C.F.R. § 233.20(a)(3)(ii)(*c*) (emphasis added).

The Court below properly applied this rule and this Court's recognition in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup.Ct. 1746, 1753-54, that income must be individually determined, and held that:

> "No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient. Only the *actual value* . . . could possibly constitute income to the recipient, and this the regulation does not measure." *Swoap v. Cooper,* Pet., App., 19 (emphasis in original); *see also, Swoap v. Waits,* Pet., App., 8-9.[19]

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19. *Cf., Barron v. Bellairs,* ..... F.2d ....., No. 74-1210 (5th Cir., June 28, 1974) which held invalid under the same rule a Georgia regulation requiring the averaging of the past six months' child support payment in lieu of the actual amount.

B. ALTHOUGH NOT PASSED UPON BY THE COURT BELOW IN SWOAP V. COOPER, THE REGULATION AT ISSUE ALSO VIOLATES 42 U.S.C. § 602(a)(24) AND THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

The *Cooper* regulation, EAS § 44-115.8, becomes operative only when an AFDC family is living with an SSI recipient.[20] A 1972 amendment to the AFDC title of the Social Security Act provides that:

> "if an individual is receiving benefits under subchapter XVI of this chapter [SSI], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter [IV-A] and his income and resources shall not be counted as income and resources of a family under this subchapter." 42 U.S.C. § 602(a)(24), P.L. 92-603, § 414(a), 86 Stat. 1492.

On December 20, 1973, after the case was *sub judice* in the California Supreme Court, HEW interpreted 42 U.S.C. § 602(a)(24) to mean that "the need, income, resources and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home." (See Exhibit "2" attached hereto.) This provision, standing alone, clearly renders EAS § 44-115.8 invalid. Under this Court's longstanding *Schooner Peggy* doctrine, 42 U.S.C. § 602(a)(24) should be applied by this Court although it was not considered below. *See Bradley v. School Bd. of Richmond* (1974) ..... U.S. ....., 94 Sup. Ct. 2006, 2016-21.

EAS § 44-115.8 is also invalid under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it applies only when an AFDC family is

20. The regulation uses the term "recipients of adult aids." When written, it referred to recipients of OAS, AB and APTD; the term was not changed when these programs were replaced by the federally administered SSI program. *See supra*, p. 5, n. 7.

sharing housing with one or more SSI recipients. If three AFDC children live with their mother and their elderly grandmother, and the latter receives $235 per month from SSI, then it is operative. If, however, the grandmother receives $235 (or $335, or whatever) from Social Security (Title II of the Act) or Railroad Retirement benefits, or Unemployment Insurance, earnings, etc., it does *not* apply; if the grandmother herself is an AFDC mother, it does not apply; if an AFDC family shares housing with another AFDC family, it does not apply. There is simply no conceivable rational basis for such capricious classification and it is therefore invalid. *McGowan v. Maryland* (1961) 366 U.S. 420; *United States Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 538.

C. THE REGULATION AT ISSUE IN SWOAP V. WAITS CONCLUSIVELY PRESUMES THAT NON-NEEDY CARETAKER RELATIVES ARE WILLING AND ABLE TO, AND DO, PROVIDE FREE HOUSING AND UTILITIES TO THE AFDC CHILDREN RESIDING WITH THEM. IT THEREFORE VIOLATES HEW'S "ACTUALLY AVAILABLE INCOME" RULE AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Critical to an understanding of this issue is the fact that non-needy caretaker relatives, as contrasted with parents, have absolutely no legal duty to support the children that accidental misfortune or parental neglect have thrust upon them. Therefore, under this Court's decisions in *King v. Smith* (1968) 392 U.S. 309 and *Lewis v. Martin* (1970) 397 U.S. 552, EAS § 44-115.6 is violative of the "actually available income" rule of the Social Security Act because it assumes a donative intent when such intent may not *in fact* be present. There must be "proof of actual contributions." 45 C.F.R. § 233.90(a); see also, 45 C.F.R. § 233.20(a)(3)(ii)(*c*) and cases cited by the Court below in *Swoap v. Waits*, Pet., App., 6-8.

Although we have no doubt as to the applicability of the foregoing federal regulatory provisions, even if the Court were to decide that they were inapplicable, EAS § 44-115.6, nevertheless violates the Fourteenth Amendment's Due Process Clause because it establishes a conclusive evidentiary presumption of donative intent with no rational connection between the fact proved (children living with relatives who have no duty to support) and the fact presumed (donation of housing and utilities). *Vlandis v. Kline* (1973) 412 U.S. 441, 452; *Heiner v. Donnan* (1932) 285 U.S. 312, 328-30; *Mobile, J. & K.C. Ry. v. Turnipseed* (1910) 219 U.S. 35, 43-44.

III. There Is No Compelling Reason Why This Court Should Preempt the U.S. Department of Health, Education and Welfare from Making an Initial Determination Whether or Not California Law, as Construed by the Court Below, Violates Supervening Federal Law.

At the outset, the Court should be fully aware of the rather bizarre posture of petitioners before the Court. They are officers of the Executive branch of California government who claim that a state statute, which they are bound to enforce as the Legislature intended, and as the Governor signed, California Constitution, Art. 5, § 7, is invalid because it breaches federal law. This attack on state law is made on their behalf by the State's Attorney General, who is also bound to defend the State Legislature's will embodied in its enacted measures. Calif. Const., Art. 5, § 21.

The claim that state welfare statutes or regulations violate federal law is ordinarily made by those adversely affected, the state's welfare recipients. The claim is that the state law *deprives* them of rights conferred by the supervening federal law. No such claim is asserted here. Rather,

state welfare officials thrust the Excalibur of federal law through the shield of a state statute in order to *deprive* recipients of the benefits which the California Legislature strove to confer upon them.

If the rulings below truly do put California's AFDC plan out of conformity with federal law, how are petitioners injured thereby? The only conceivable injury would be the threat of termination of federal funds. Title 42 U.S.C. § 604 provides that if the Secretary of HEW determines that a state plan no longer conforms to federal law, he shall cease providing federal funds to that state. See *Rosado v. Wyman* (1970) 397 U.S. 397, 430-33 (Black, J., dissenting); *Arizona Dept. of Public Welfare v. U.S. Dept. of HEW* (9th Cir. 1971) 449 F.2d 456, 460-62, *cert. den.* 405 U.S. 919 (1972); 45 C.F.R. § 213. The Secretary's decision is then reviewable by the Court of Appeals and finally by this Court. 42 U.S.C. § 1316(3), (5). No termination would occur until the review process is completed.[21] Since those contributions to California now approach $700 million annually, such a consequence is not to be looked upon lightly. However, there is absolutely no indication that HEW shares petitioners' interpretation of § 402(a)(7) or that the agency intends to initiate termination proceedings.

In *Rosado v. Wyman* (1970) 397 U.S. 397, 425-26, this Court rejected New York's suggestion that welfare recipients should not be permitted to initiate judicial proceedings challenging state laws as violative of federal welfare

21. Actual termination cannot occur in California since the California Legislature has provided a statutory mechanism whereby any offending provision of California law is automatically amended to reach conformity when HEW issues a "formal ruling" of nonconformity. Welf. & Inst. Code § 11003; *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 454-55.

law until HEW has passed on the question. However, the serious adverse consequences that would befall recipients, who were correct in their claims, if they were subject to the long delays inherent in such a primary jurisdiction bar are inapplicable when the claim of nonconformity is raised by state officials administering the alleged nonconforming state law. Because of the different interests in such a situation, the arguments in support of primary jurisdiction made by Mr. Justice Black in his dissent in *Rosado, supra*, 397 U.S. at 430-35, are particularly appropriate under these peculiar circumstances.

CONCLUSION

For each of the foregoing reasons we would suggest that the Court deny the Petitions for Certiorari.

Dated: October 11, 1974
San Francisco, California

Respectfully submitted,

RALPH SANTIAGO ABASCAL
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Attorneys for Respondents

Exhibit 1

§ 11452. Minimum basic standards of adequate care

Minimum basic standards of adequate care shall be distributed to the counties and shall be binding upon them. Such standards are hereby determined on the basis of the schedule set forth in this section, as adjusted for cost-of-living increases or decreases pursuant to Section 11453, which schedule is designed to insure:

(1) Safe, healthful housing.

(2) Minimum clothing for health and decency.

(3) Low-cost adequate food budget meeting recommended dietary allowances of the National Research Council.

(4) Utilities.

(5) Other items including household operation, education and incidentals, recreation, personal needs, and insurance.

(6) Allowance for essential medical, dental, or other remedial care to the extent not otherwise provided at public expense.

(7) Other recurring special needs.

The schedule of minimum basic standards of adequate care is as follows:

Number of Needy Persons in the Same Family	Minimum Basic Standards of Adequate Care
1	$125
2	210
3	255
4	314
5	362
6	408
7	449
8	496
9	543
10	590

plus five dollars ($5) for each additional needy person.

The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this section.

(Added by Stats.1965, c. 1784, p. 4014, § 5. Amended by Stats.197 1,c. 578, p. ....., § 28.5, eff. Aug. 13, 1971.)

Exhibit 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Program Instruction
APA-PI-74-8
December 20, 1973

To: State Agencies Administering Approved Public Assistance Plans

SUBJECT: Need, Income and Resources of SSI Beneficiaries not to be Considered under Title IV-A

CONTENT: Section 414 of Public Law 92-603 amends the Social Security Act by adding Section 402(a)(24), effective January 1, 1973, and provides: "(24) if an individual is receiving benefits under Title XVI, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits under this title and his income and resources shall not be counted as income and resources of a family under this title."

This provision prohibits the inclusion of an individual receiving benefits under Title XVI, for the period for which such benefits are received, as a member of the AFDC assistance unit for purposes of determining need and the amount of the assistance payment under Title IV-A. It also prohibits the counting of income and resources of a beneficiary under Title XVI

as income and resources available to an assistance unit applying for or receiving assistance under Title IV-A.

A separate and independent computation for determining need and the amount of the assistance payment is required for AFDC assistance units when there are both Title IV-A applicants or recipients, and Title XVI beneficiary(ies) present in the same home. Computations for Title IV-A cases are not to include the needs, income or resources of Title XVI beneficiaries.

Under the provisions of 402(a)(24) State plans are to specify a method for the determination of need and the amount of the assistance payment which takes into consideration only the need, income and resources of the AFDC assistance unit and which does not include the need, income and resources of persons receiving benefits under Title XVI when they are in combined households.

In applying this provision contained in 45 CFR 233.20, the need, income, resources, and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home.

INQUIRIES

To: SRS Regional Commissioners.

Commissioner, Assistance Payments Administration